The Status of 'Europeanised' International Law in Austria, Switzerland and Liechtenstein

Astrid Epiney/Bernhard Hofstötter in collaboration with Markus Wyssling

Dieser Beitrag wurde erstmals wie folgt veröffentlicht:
***Astrid Epiney/Bernhard Hofstötter,* Chapter 8: The Status of „Europeanised" International Law in Austria, Switzerland and Liechtenstein, in: Jan Wouters/André Nollkaemper/Erika de Wet (Hrsg.), The Europeanisation of International Law. The Status of International Law in the EU and ist Member States, Den Haag 2008, S. 137-160. Es ist möglich, dass die Druckversion – die allein zitierfähig ist – im Verhältnis zu diesem Manuskript geringfügige Modifikationen enthält.**

1. Introduction

The European Community (EC), very often together with its Member States,[1] is a party to a multitude of international agreements in various fields. According to the European Court of Justice (ECJ) these treaties form an 'integral part of the Community legal system.'[2] The interpretation and application of those treaties is, thus, not only a matter of international law or each Member State's domestic constitutional law but also an issue of European Community law. In other words, as far as their legal effects in the Member States are concerned, those treaties are different from any treaty that a Member State has concluded independently of the EC. The following contribution explores this issue – based on the framework of Community law (2.) – for one Member State in particular (Austria) and analyses how Community law standards are applied (and respected) in Austrian Law (3.).

The correlation between international law and European Community law also embraces another aspect: in many international agreements, the EC succeeds in integrating sometimes very large parts of European Community law, of the so-called *acquis communautaire*. In such constellations, international law serves as a medium to introduce parts of the *acquis communautaire* into international agreements. As a consequence, on the one hand the latter has to be applied between the European Community and the third State, and very often within the third State on the other hand. Nevertheless, such treaties are 'regular' international agreements even if their contents are heavily inspired by EC law. As far as the interpretation and the legal effects of those treaties are concerned, they give rise to a number of problems, such as the risk of fragmentation of the case law in the polities involved. For this reason we suggest to take a closer look at two of those arrangements in two different States: the legal effects of the European Economic Area Agreement (EEA Agreement) in Liechtenstein and the 'bilateral agreements' between the European Community (and partly the EU Member States) and Switzerland (4.).

---

1 'Mixed Agreements'.

2 ECJ, Case 181/73 *Haegemann* [1974] *ECR* 449 para. 2/6; ECJ, Case 104/81 *Kupferberg* [1982] *ECR* 3641 para. 13; ECJ, Case 12/86 *Demirel* [1987] *ECR* 3641 para. 7; ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461 para. 8.

2. Legal effects of International Agreements in European Community Law

International agreements concluded by the EC – and, as the case may be, the EU Member States – entail a number of legal effects. This being so, the effects in the international legal order (2.1.) are to be distinguished from those in the Community legal order (2.2.). Mixed agreements[3], especially, raise a series of problems that are worth paying particular attention to.

2.1. The International Legal Order

Following their entry into force, international agreements are binding for the parties (*pacta sunt servanda*).[4] The binding effect will in principle embrace all the agreements' provisions as a whole.[5] In the case of federally or supra-nationally organised entities the binding effect extends to the hierarchically superior level (federal State or EC) even if it is domestically not competent to conclude, partially or entirely, an analogical agreement. Applied to mixed agreements it follows that the Community as well as the EU Member States are bound by the entire agreement, independently of the internal allocation of competences, which in principle cannot be relied on as against third parties.[6] This, of course, applies only as long as the wording or the object and purpose of the agreement do not clearly indicate the contrary.[7] In

---

3 On the notion of mixed agreements in general cf. D. O'Keeffe/H.G. Schermers (eds.), *Mixed Agreements*, (Antwerp etc., Kluwer Law and Taxation Publ., 1983); K.D. Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Berlin, Duncker & Humblot 1986); J. Heliskoski, *Mixed Agreements as a technique for organizing the international relations of the European Community and its Member States* (The Hague, Kluwer Law International 2001); A. Bleckmann, *Europarecht* (Köln, C. Heymann 1997) p. 513; A. Rosas, 'Mixed Union – Mixed Agreements', in M. Koskienniemi, ed., *International Law Aspects of the European Union* (The Hague, Kluwer Law International 1998) p. 125 et seq.; N. A. Neuwahl, 'Joint Participation in international treaties and the exercise of power by the EEC and its Member States: Mixed Agreements ', *CMLR* (1991) p. 717 et seq.

4 The binding effect of international law is a consequence of international law principles, cf. Art. 26 of the Vienna Convention on the Law of Treaties, and not only of Art. 300(7) EC, which refers to the Community legal system. On this problem cf. Heintschel von Heinegg, 'EG im Verhältnis zu internationalen Organisationen und Einrichtungen', in H.-W. Rengeling, ed., *Handbuch zum deutschen und europäischen Umweltrecht* (Köln, C. Heymanns 2003) § 22 No. 35.

5 P.E. Holzer, *Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen* (Zurich, Schulthess Polygraphischer Verlag, 1998) p. 15 et seq.; Heintschel von Heinegg, loc. cit. n. 4, § 22 No. 38; L. Granvik, 'Incomplete Mixed Environmental Agreements or the Community and the Principle of Bindingness', in M. Koskienniemi, ed., *International Law Aspects of the European Union* (The Hague, Kluwer Law International 1998) p. 255 at p. 262. The parties other than the EC and the EU Member States cannot pray in aid Article 300(7) EC, however. See A. Oehmichen, *Die unmittelbare Anwendbarkeit der völkerrechtlichen Verträge der EG* (Frankfurt am Main, Berlin etc., P. Lang 1992), p. 104 et seq. and M. Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-Member Parties care?', 70 *Nordic Journal of International Law* (2001) pp. 373 et seq.

6 In his opinion in Case C-316/91 Advocate General Jacobs states that the Community, as well as the EU Member States, are bound by a mixed agreement, unless the agreement provides to the contrary. AG Jacobs, Case C-316/91 *European Parliament* v. *Commission* [1994] *ECR* 625. See also Heintschel von Heinegg, loc. cit. n. 4, § 22 no. 38.

7 Cf. as well Articles 27, 46 of the Vienna Convention on the Law of Treaties.

other words, according to international law the EC and the EU Member States are equally responsible for the performance of the entire treaty, unless the parties have explicitly agreed on a different approach taking recourse to a 'commitment clause' which explicitly signals to the other contracting States the respective areas of competence and responsibility of the EC and the EU Member States.[8] In this latter case, mixed agreements will be binding on the parties only to the limited extent of the clause.

2.2. The Community Legal Order

Based on Article 300(7) EC[9] the ECJ stresses in a consistent line of case law that international agreements concluded by the EC form an 'integral part'[10] of the Community legal system and are of 'Community nature.'[11] This characterization implies in any event that the provisions form part of positive EC law. However, they are not to be classified as Community law but rather as international law, for international agreements become, as they enter into force on the international level, an integral part of the Community legal system[12] and require no further measures of transposition. This suggests that the content of these provisions are not subject to change and they retain also their legal nature as instruments of international law.[13] Moreover, the principles of interpretation of international agreements support this approach: provisions

---

8 Oehmichen, op. cit. n. 5 at p. 101; Ukrow, 'Art. 281', in: C. Calliess/M. Ruffert, eds., *Kommentar zum EU-Vertrag und EG-Vertrag* (Neuwied etc., Luchterhand 2002) No. 17. Contra C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin, Duncker & Humblot 2001) p. 240 et seq., who takes the view that the EC, as well as the EU Member States, regardless of the lack of a 'commitment clause' will only be bound to those provisions coming under their explicit sphere of competence. For, in so far as the conclusion of a treaty serves to bridge a split of competences, the latter would also have to be taken into consideration in relation to third parties. However, it is apparent that this approach does not give heed to the pertinent rules of the Vienna Convention on the Law of Treaties (VCLT), which proceed on the assumption that internal "difficulties" in principle cannot put into question the binding effects of an international agreement on the parties to a treaty. Cf. Arts. 27 and 46 VCLT. It is not to be concealed that 'commitment clauses' may give rise to intricate legal issues, since they are often phrased in unclear terms. Cf. for this matter in detail Björklund, loc. cit. n. 5, pp. 376 et seq., who addresses the significance of Arts. 27 and 46 VCLT in this context.

9 Whereupon agreements concluded by the Community are binding for the institutions of the Community and the Member States.

10 ECJ, Case 181/73 *Haegemann* [1974] *ECR* 449 para. 2/6; ECJ, Case 104/81 *Kupferberg* [1982] *ECR* 3641 para. 13; ECJ, Case 12/86 *Demirel* [1987] *ECR* 3641 para. 7; ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461 para. 8. Cf. A. Epiney, 'Zur Stellung des Völkerrechts in der EU. Zugleich Besprechung von EuGH, EuZW 1998, 572 - Hèrmes und EuZW 1998, 694 - Racke', *Europäische Zeitschrift für Wirtschaftsrecht* (1999), pp. 5-6; A. Ott, *Gatt und WTO im Gemeinschaftsrecht* (Köln, C. Heymann 1997) pp. 68 et seq.; S. Hobe/Müller-Sartori, 'Rechtsfragen der Einbindung der EG/EU in das Völkerrecht, *Juristische Schulung* (2002) pp. 8-12.

11 See ECJ, Case 104/81 *Kupferberg* [1982] *ECR* 3641 para. 14.

12 Cf. ECJ, Case 181/73 *Haegemann* [1974] *ECR* 449 para. 11/16; ECJ, Case 12/86 *Demirel* [1987] *ECR* 3641 para. 7; ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461 para. 8.

13 See also C. Tomuschat, 'Art. 300', in H. Groeben/J. Schwarze, eds., *Kommentar zum EU-/EG-Vertrag*, 6th edn. (Baden-Baden, Nomos 2003) No. 67; C. Eberle, *Die EG als Partei internationaler Umweltschutzübereinkommen* (Heidelberg, 2001) p. 224 et seq.; see also A. Peters, 'The Position of International Law within the European Community Legal Order', 70 *GYIL* (1997) p. 9 at pp. 28 et seq.; see also Epiney, loc. cit. n. 10, pp. 5-6.

in treaties that equal those in Community law are not necessarily to be interpreted equally, but rather their interpretation has to comply with international law standards.[14]

Nevertheless, the treaties form part of the Community legal order as far as they gain validity in the Community. Even though they do not lose their international law-character which not least finds expression in the applicability of the ordinary methods of treaty interpretation codified in Articles 31 et seq. VCLT, they are binding on the EU Member States and the EU institutions just like other acts of Community law. The latter implies the applicability of the principle of supremacy of Community law also to such international norms.[15] To this extent international agreements binding on the EC simply form part of Community law.

The question of direct effect – meaning the ability of individuals to invoke provisions of a treaty[16] – is to be answered by applying these principles.[17] The fact that treaties form part of the Community legal system, implies that treaty provisions are capable of having direct effect, since provisions of Community law can be directly effective.[18] Treaty law, however, applies as such and does not lose its international character. The question under which circumstances a provision is directly effective, can therefore not be simply answered in the abstract by automatically referring to the Community law principles that have been developed for that purpose. Rather, the specifics of each particular treaty need to be taken into account.[19]

Mixed agreements pose particular problems. They contain (at least *a priori*) provisions that fall within the competence of the Community, as well as such that fall within the competence of the Member States. This raises the question whether the entire treaty has to be regarded as an integral part of the Community legal system or only those components that fall within the competence of the Community. The more convincing arguments plead for the latter option. According to the principles of division of competences between the Community and the Member States, Community law effects cannot be assumed for those provisions of

---

14 ECJ, Case 270/80 *Polydor* [1982] *ECR* 329 para. 18 ff. For a more detailed analysis with further references see A. Epiney/A. Felder, 'Europäischer Wirtschaftsraum und Europäische Gemeinschaft: Parallelen und Divergenzen in Rechtsordnung und Auslegung', *Zeitschrift für Vergleichende Rechtswissenschaft* (2001) p. 425 et seq.

15 See Epiney, loc. cit. n. 10, pp. 5-6; see also Heintschel von Heinegg, loc. cit. n. 4, § 22 No. 36.

16 Incidentally, one has to point out that international agreements may, in principle, be directly applicable – without necessarily conferring individual rights – as long as the obligations therein are sufficiently precise and clear. Cf., e.g., ECJ, Case 17/81 *Pabst und Richarz KG* [1982] *ECR* 1331 para. 27.

17 From the point of view of international law, the question whether and in how far provisions of an agreement are directly effective, depends on the interpretation of the particular treaty and the constitutional law of the State concerned. Cf. P.E. Holzer, *Ermittlung der innerstaatlichen Anwendbarkeit* (Zurich, Schulthess 1998) p. 36 et seq.; C. Eberle, *Die EG als Partei internationaler Umweltschutzübereinkommen* (Heidelberg, 2001) p. 232 et seq.

18 See also Heintschel von Heinegg, loc. cit. n. 4, § 22 No. 36.

19 Cf. Epiney, loc. cit. n. 10, pp. 5-6, with further indications. For details G. Bebr, 'Gemeinschaftsabkommen und ihre mögliche unmittelbare Wirksamkeit', *EuR* (1983), 128 et seq.; Tomuschat, loc. cit. n. 13, at para. 70 et seq.; E.U. Petersmann, 'Auswärtige Gewalt, Völkerrechtspraxis und Völkerrechtsbindungen', *ZaöRV* (1975) p. 261 at p. 270; Eberle, op. cit. n. 17, p. 234 et seq. Cf. also Heintschel von Heinegg, loc. cit. n. 4, § 22 No. 35. Jurisdiction: ECJ, Case 12/86 *Demirel* [1987] *ECR* 3641 para. 14; ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461 para. 15; ECJ, Case C-432/92 *Anastasiou* [1994] *ECR* I-3087 para. 23; ECJ, Case C-162/96 *Racke* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655 para. 31; ECJ, Case C-262/96 *Sema Sürül* v. *Bundesanstalt für Arbeit* [1999] *ECR* I-2685 para. 74.

international agreements that fall within the competence of the Member States. Otherwise, the division of competences provided by primary Community law could be modified by concluding mixed agreements.[20] It is, however, the Member States' task to decide what effects treaties, as far as they relate to their competence, can display in the domestic forum. Thus, the treaty provisions falling within Member States' competence do not share the special character of Community law and their effects are determined according to the principles of domestic (constitutional) law.

It cannot be overlooked that this differentiated approach will encounter certain practical difficulties. In fact, it will not always be clear which provisions (still) fall within the competence of the Community and which do not (anymore).[21] In any event, one cannot object the view expounded by arguing that the ECJ would normally qualify mixed agreements *in toto* and without differentiating between spheres of competence as an integral part of the Community legal system.[22] On the one hand, in exercising its jurisdiction to interpret provisions of mixed agreements, the ECJ reviews whether they come within the sphere of competence of the Community[23]; on the other hand, this does not necessarily include a statement regarding the precise legal effects of mixed agreements. Furthermore, it has to be pointed out that the Community will also be competent to conclude treaties in cases of competence which is shared with the Member States at the time of conclusion of an international agreement. But the Community is not competent to conclude provisions of mixed agreements, which do not fall within its (shared) competence.

International agreements concluded by the Community take precedence over secondary Community law. This follows from Article 300(7) EC according to which agreements are binding, *inter alia*, for the institutions. Under certain circumstances Article 300(6) EC provides for the possibility to obtain the opinion of the ECJ as to whether an envisaged international agreement is compatible with the provisions of the EC. If the compatibility is denied, the agreement may enter into force only in accordance with the procedure for the

---

20 See also Tomuschat, 'Art. 228', in H. Groeben/J. Schwarze, eds., *Kommentar zum EU-/EG-Vertrag* (Baden-Baden, Nomos 2003) para. 88; Ott, op. cit. n. 10, pp. 212 et seq.; Hobe/Müller-Sartori, loc. cit. n. 10, pp. 8-12; H.G. Schermers, 'International Organizations as Members of other International Organisations', in B. von Rudolf, et al., eds., *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte* (Berlin, Springer-Verlag 1983) p. 831 et seq.; K. Schmalenbach, 'Art. 300 EGV', in C. Calliess/ M. Ruffert, *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd edn. (Neuwied, Hermann Luchterhand Verlag 2002) Art. 300 EGV para. 69; Heintschel von Heinegg, loc. cit. n. 4, § 22 No. 38; *contra* K.D. Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Berlin, Duncker & Humblot 1986) p. 134, p. 187; H. Krück, 'Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften', 70 *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (1977), p. 102 et seq.

21 Cf. D. Thieme, 'European Community External Relations in the Field of the Environment', 10 *EELR* (2001), p. 252 - 254.

22 Cf., ECJ, Case 181/73 *Haegemann* [1974] *ECR* 449 para. 11/16. Critical towards *Haegemann* and the follwing judgements P. Gasparon, 'The Transposition of the Principle of Member State Liability into the Context of External Relations', 10 *European Journal of International Law* (1999), p. 605 at p. 610. Whether questions for a preliminary ruling concerning mixed agreements are admissible cf. J. Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', 69 NordJIL (2000), 395.

23 Cf., e.g., ECJ, Case C-53/96, *Hermès* [1998] *ECR* I-3603.

amendment of the EC. This implies the supremacy of primary Community law over international agreements.[24] However, this hierarchy of norms is to be interpreted in line with the principle of *pacta sunt servanda*. Consequently, if an agreement is incompatible with primary Community law, it may be disregarded only to the extent that this is consonant with the international commitments in issue.[25] Faced with ambiguous provisions of secondary Community law, the priority of international law implies giving preference as far as possible to an interpretation which renders the provisions of secondary Community law consistent with treaty rules.[26] From a dogmatic point of view, the obligation to interpret in conformity with international law amounts to the international dimension of the doctrine of conform interpretation. Over and above that, domestic authorities are – as a result of the principle of the supremacy of Community law – obliged to interpret and apply domestic law in accordance with treaties of the Community and therefore in conformity with Community law.[27] The principle to interpret in conformity with international law is *a fortiori* valid especially for secondary Community law implementing treaties concluded by the Community.[28]

3. 'Europeanised' international agreements in Austria

With regard to the reception in Austria of international agreements concluded by the EC, or jointly by the EC and the EU Member States, the following analysis will dwell on three relevant questions. First, procedures applicable to the conclusion and ratification of treaties pursuant to the Austrian Constitution will be scrutinized for possible elements of Europeanisation. This will require a short exposition of the pertinent general rules foreseen by Austrian constitutional law in order to pinpoint the specifics for international agreements concluded by the EC, or jointly with the EU Member States. Second, the implementation of international agreements in a federal State, such as Austria, customarily poses problems as to the competences of the various national actors on State and sub-State level. This, in turn, holds equally true for agreements concluded by the EC, and has received specific attention by the Austrian law-maker. Third, select examples of the recent case law of the Austrian supreme courts will shed some light on the implementation of 'Europeanised' international agreements by the national judiciary. The focus of the discussion will lie on the question whether or not

---

24 See also Hobe/Müller-Sartori, loc. cit. n. 10, pp. 8-12.

25 We will not address this problem further. Cf. for more details and further indications Epiney, loc. cit. n. 10, pp. 5-8.

26 ECJ, Case C-61/94 C*ommission* v. *Germany* [1996] *ECR* I-3989 para. 52; confirmed in ECJ, Case C-179/97 *Kingdom of Spain* v. *Commission* [1999] *ECR* 1251 para. 11; on the former judgment cf. T. Heukels, 'Von richtlinienkonformer zur völkerrechtskonformen Auslegung im EG-Recht: internationale Dimensionen einer normhierarchiegerechten Interpretationsmaxime', 3 *Zeitschrift für europarechtliche Studien* (1999), p. 313 at 319 et seq.

27 See P. Manin, 'A propos de l'accord instituant l'Organisation mondiale du commerce et de l'accord sur les marches publics: la question de l'invocabilité des accords internationaux conclus par la Communauté Européenne, *RTDE* (1997) p. 399 at pp. 412 et seq.

28 ECJ, Case C-341/95 *Gianni Bettati* v. *Safety Hi-Tech Srl* [1998] *ECR* I-4355 para. 19 f.; ECJ, Case C-284/95 *Safety Hi-Tech Srl* v. *S. & T. Srl.* [1998] *ECR* I-4301 para. 21 f.

Austrian courts in general tend to accept the legal consequences associated with treaties in the Community legal order, in particular the doctrines of direct applicability and direct effect.

3.1. 'Europeanisation' of rules pertaining to the involvement of Austrian actors in the conclusion/ratification of international agreements?

Pursuant to Article 9(1) of the Austrian Constitution[29] general rules of international law are automatically incorporated into Austrian federal law. Whereas the controversy as to the rank of such incorporated international law in the domestic legal order has not yet been definitively settled[30] and it is equally debated whether or not this provision extends to general principles of international law,[31] it is generally recognized that it covers (at least) customary international law. It is equally uncontested that it does not apply to treaties since the issue of the transformation of treaties is governed by separate rules laid down in the Constitution:[32] According to Article 65 of the Constitution treaties are concluded by the Federal President. In line with pertinent rules of public international law,[33] Austrian constitutional law builds on the seminal distinction between simple and composite procedure of concluding treaties. In the former case, already the signature by a competent organ will give rise to the binding force of a treaty. In principle, the Federal President will be the organ competent for signature pursuant to Article 65 of the Constitution. However, in conformity with Article 66(2) of the Constitution, the Federal President has delegated the conclusion of certain categories of treaties to the Federal Government or competent ministers.[34] This delegation may only relate to treaties not falling under Article 50 of the Constitution which in case of treaties of a political character and treaties supplementing or amending statutory law requires prior approval of the National and the Federal Councils.[35] By means of this provision Austrian

---

29 Austrian Constitution (Bundes-Verfassungsgesetz (B-VG)), (Austrian) Official Gazette (BGBl.) Nr. 1/1930, as most recently amended by Official Gazette I Nr. 2005/121.

30 For the different approaches advocated in scholarly writing cf. R. Walter and H. Mayer, *Grundriss des österreichischen Bundesverfassungsrechts* (Vienna, Manz 2000) p. 102 et seq.; B. Simma, 'Das Völkergewohnheitsrecht', in H. Neuhold, et al., eds., *Österreichisches Handbuch des Völkerrechts*, Vol. 1 (Vienna, Manz 2004) p. 44; for the widespread view that international law incorporated by means of Article 9 takes a place in between national constitutional law and (simple) statutory law (so-called *'Mezzanintheorie'*) see Th. Öhlinger, *Verfassungsrecht* (Vienna, WUV Universitätsverlag 2005) p. 77.

31 In the affirmative: Öhlinger, op. cit. n. 30, at p. 76; undecided: Walter and Mayer, op. cit. n. 30, at p. 102; *contra*: Simma, loc. cit. n. 30, at p. 43 et seq., and H. Hausmaninger, *The Austrian Legal System* (Vienna, Manz 2003), p. 28.

32 Walter and Mayer, op. cit. n. 30, at p. 102; Öhlinger, op. cit. n. 30, at p. 76 et seq.

33 Cf. Article 11 VCLT; on this article see – instead of many – M. Fitzmaurice, 'The practical working of the law of treaties', in M. Evans, ed., *International Law* (Oxford, OUP 2006), p. 191 et seq.

34 Decision of 31 December 1920, Austrian Official Gazette 1921/49; see also K. Zemanek, 'Völkervertragsrecht', in H. Neuhold, et al., eds., *Österreichisches Handbuch des Völkerrechts*, Vol. 1 (Vienna, Manz 2004).

35 Walter and Mayer, op. cit. n. 30, at p. 106. The National Council is the first chamber of the Austrian parliament, with supreme legislative powers vested in this body. By contrast, the Federal Council as the second chamber of parliament may at best exercise a suspensive veto, but has no power to permanently oppose a legislative proposal. In light of these imbalances it is fitting to speak of an imperfect bicameral system. Cf. L. Prakke, 'The Republic of Austria', in L. Prakke and C. Kortmann, eds., *Constitutional Law of 15 EU Member States* (Deventer, Kluwer 2004), 34 et seq.

constitutional law accommodates the composite procedure of concluding international agreements. Only once treaties covered by Article 50 of the Constitution have been approved by parliament, they can be ratified by the Federal President (Article 50 of the Constitution). This right of the Federal President presupposes a prior request to this extent by the Federal Government (Article 67(1) of the Constitution). The President is under no duty to ratify a treaty, but only his ratification in conjunction with the exchange or deposit of the documents of ratification will give rise to the conclusion of a treaty.[36] Upon the subsequent publication of a treaty – as a rule in the Austrian Official Gazette – the treaty will become valid and effective within the national legal order.

Austria's accession to the European Union in 1995 saw the advent of a new section introduced into the Austrian Constitution (Articles 23a – 23f, entitled "European Union")[37] setting out the rules necessary to give shape to Austrian participation in the decision-making of the European Union. The primary aim of this section is therefore to facilitate the functioning of the pertinent provisions of EU constitutional law by means of national constitutional law.[38] In more concrete terms, the said section addresses Austria's participation in the EU institutions, such as the *modus operandi* of elections of the Austrian MEPs, as well as the participation of the Austrian parliament and – to the extent their sphere of interest is touched upon – of the Austrian *Länder* in legislative projects of the European Union. With regard to the participation of the Austrian parliament, Article 23e (1) of the Constitution[39] obliges the competent member of the Federal Government to inform and consult the National and the Federal Councils about all projects *("alle Vorhaben")* in the framework of the European Union without delay. If the (legislative) projects need to be implemented by federal statutory law, or otherwise aim at the adoption of a directly applicable legal act impinging on a competence held by the Federal State, the opinion expressed by the National Council is binding. Deviations will only be possible in the light of compelling reasons of foreign and integration policy and only after a fresh consultation of the National Council (Article 23e (2) of the Constitution). The question, thus, is, in how far treaties to be concluded by the EC may be taken to fall under the category of "all projects" of the European Union, necessitating by way of consequence the involvement of the Austrian parliament. Given the implicit allusion of Article 23e (1) of the Constitution to directives and regulations it seems clear that it is first and foremost concerned with secondary Community law.[40] At the same time there is no compelling reason for excluding parliamentary involvement in case of the envisaged conclusion of treaties. Finding in favour of subsuming international agreements under the "all projects"-rule is further corroborated by the central role taken by the Council of the European

36 Walter and Mayer, op. cit. n. 30, at p. 107.
37 Austrian Constitution, as amended by (Austrian) Official Gazette Nr. 1994/1013.
38 Öhlinger, op. cit. n. 30, at p. 97.
39 Austrian Constitution, as amended by (Austrian) Official Gazette I Nr. 2001/121.
40 Öhlinger, op. cit. n. 30, at p. 100 et seq.

Union in the adoption of treaties, either in issuing a mandate to the European Commission to negotiate, or in finally concluding treaties on behalf of the EC.[41] In obliging *ministers* to consult with the national parliament, Article 23e of the Constitution takes the central law-making function of the Council as its point of departure,[42] and must consequently also be applicable in the case of treaties. Assuming, as we do, the applicability of Article 23e of the Constitution to treaties concluded by the EC, we may discern a feature of 'Europeanisation' of the procedures applicable to the conclusion of treaties here. To be sure, there is no comparable provision in the case of the conclusion of international agreements by the Republic of Austria alone. On the other hand, this should not come as too much of a surprise since in the case of international agreements concluded by Austria the parliament will almost inevitably – within the confines of Article 50 of the Constitution – have a say in the ratification process. In order to confer democratic legitimacy in the national polity the participation of parliament *qua* mandatory consultation with binding effects thus intends to bridge the gap resulting from the absence of a tangible influence of national parliaments at the European level.[43]

Now, for which kinds of international agreements will the said provisions of the Constitution be of relevance? The already introduced dichotomy between international agreements concluded by the EC alone and mixed agreements contains the key to an answer. As far as mixed agreements have a political character, or supplement or amend statutory law, the principles flowing from Article 50 of the Constitution will apply. Ratification by the parliament is thus required. This applies to the agreement in its totality, even though only some of its provisions may be of the required character.[44] In the more infrequent case of international agreements concluded by the EC alone, the institutional involvement of the Austrian parliament via the competent minister exercising voting rights on behalf of Austria is the consequence of the view represented here.

---

41 Cf. K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (London, Sweet & Maxwell 2005), p. 410.

42 Öhlinger, op. cit. n. 30, at p. 100.

43 It is both with regard to the mandatory information and the consultation of parliament with binding effect that Austrian constitutional law goes way beyond the Protocol on the Role of National Parliaments in the European Union (OJ 1997 C 340/113) attached to the Treaty of Amsterdam, which merely provides that Commission proposals "shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate". Thus, the protocol confers no autonomous right of information on national parliaments. Article 2 of a homonymous Protocol (*OJ* 2004 C 310/204) annexed to the Treaty establishing a Constitution for Europe slightly upgrades the precarious role of national parliaments by affording a self-standing right of information relating to legislative proposals. This right, in turn, lies at the heart of national parliaments' envisaged role as watchdogs of the principle of subsidiarity (Article I-11(3), 2nd subparagraph) whose ramifications are spelled out in a modified Protocol on the application of the principles of subsidiarity and proportionality (*OJ* 2004 C 310/207) annexed to the constitutional treaty.

44 Walter and Mayer, op. cit. n. 30, at p. 105 et seq.; Th. Öhlinger and M. Potacs, *Gemeinschaftsrecht und staatliches Recht – Die Anwendung des Gemeinschaftsrechts im innerstaatlichen Bereich* (Vienna, Orac 2006), p. 13; cf. also Th. Öhlinger, *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union* (Vienna/New York, Springer 1999), p. 192.

3.2. Implementation of international agreements within Austria's federal structure

The approach taken by the Austrian Constitution to the reception of international law in the national legal order may adequately be termed 'moderately' monistic, in principle giving primacy to international law.[45] It is 'moderate' in as much as national law conflicting with international law will not be invalidated as such, but rather may give rise to international responsibility.[46] As a matter of principle, international law will be incorporated by means of 'general transformation', thus, by the mere publication of the pertinent instrument of international law in the Austrian Official Gazette with the effect of henceforth being part of the law of the land in force and applicable. This process is also referred to as 'adoption' which appears to be more adequate, as it emphasises the fact that it is a treaty and not national law which provides the source of validity.[47] Thus, the 'transformed' treaty provisions retain their international law character.[48] On the other hand, recourse to 'special transformation' – *i.e.* the adoption of a national statute prescribing the behaviour mandated by the international instrument – may be had, if the National Council so decides (Article 50(2) of the Constitution; so-called *Erfüllungsvorbehalt*). This will particularly be the case when non-self-executing treaties are ratified. Whereas a radical monist may tend do ascribe a dualistic character to the Austrian system, for a 'moderate' monist the need for transformation as such in a monistic system does not amount to a *contradictio in se*, accepting that more often than not international law obligations are addressed to the State and thus require transformation in order to have legal effects also for individuals.[49] At the same time it is to be conceded that the monism/dualism debate is of fairly limited relevance for the interpretation of pertinent Austrian constitutional law.[50] Of far greater relevance is the question as to which entity is under an obligation to transpose or implement international law in a federal State.

From Article 16(4) of the Constitution it can be inferred that the competence to implement corresponds to the general allocation of competences between the federal State and the *Länder*. Thus, the *Länder* are fully competent to implement international agreements whose contents touch upon their autonomous scope of action. At the same time, Article 16(4) of the Constitution provides for a devolution of this competence to the federal State if one of the *Länder* fails to fulfil its obligations in due time. Article 23d (5) provides for a 'Europeanisation' of this rule, transferring its main thrust to the question of the

45 Walter and Mayer, op. cit. n. 30, at p. 101; Öhlinger, op. cit. n. 30, at p. 75 et seq.; cf. also F. Ermacora and W. Hummer, 'Völkerrecht, Recht der Europäischen Union und Landesrecht' in H. Neuhold, et al., *Österreichisches Handbuch des Völkerrechts*, Vol. 1 (Vienna, Manz 2004); but see W. Wormuth, *Die Bedeutung des Europarechts für die Entwicklung des Völkerrechts* (Frankfurt, Peter Lang 2004), p. 129 et seq., who – erroneously – attributes the hallmarks of an „explicitly dualistic" approach to the Austrian system.

46 Ermacora and Hummer, loc. cit. 45, at p. 112.

47 Zemanek, loc. cit. n. 34, at p. 61.

48 Ermacora and Hummer, loc. cit. 45, at p. 115.

49 Cf. Öhlinger, op. cit. n. 30, at p. 76.

50 *Ibid.*

implementation of legal acts adopted in the framework of European integration. However, here the devolution is made subject to the additional requirement of the ECJ having found a breach of an obligation to implement, translating in practical terms into a condemning judgment in the framework of the infringement procedure (Article 226 *et seq.* of the EC Treaty).[51] It is exactly this elevated threshold for triggering devolution which necessitates a delimitation between Article 16(4) and Article 23d (5) of the Austrian Constitution. There is little doubt that agreements concluded by the EC alone need to be qualified as legal acts adopted in the framework of European integration, to which Article 23d (5) of the Constitution refers. Consequently, the devolution to the federal State of implementing competences pertaining to the *Länder* will be dependent on a prior finding of a violation by the ECJ. The answer is less clear-cut with regard to mixed agreements, owing to their double nature of legal acts adopted in the framework of European integration (Article 23d (5) of the Constitution) and 'ordinary' treaties from the viewpoint of Article 16(4) of the Constitution. Again, an approach differentiating between Community and national competences is well advised. In so far as the content of a mixed agreement is covered by Community competence the additional requirement of a prior ECJ-involvement under Article 23d (5) of the Constitution will be applicable. Conversely, as far as national competences are concerned, Article 16(4) applies.[52] Needless to say, striking the balance between these two provisions will entail similar interpretative difficulties as does answering the question which provisions of a mixed agreement form an integral part of the Community legal order.[53]

3.3. 'Europeanised' international agreements in the case law of Austrian supreme courts

Since Austria's accession to the European Union on 1 January 1995 sufficient time has lapsed in order to allow Austrian courts to develop their case law against the background of the precepts flowing from European Community law. Taking a look at the case law of Austrian supreme courts[54] relating to international commitments of the EC since then, cases in connection with the association agreement between the EEC and Turkey abound. Whereas a comprehensive overview is clearly beyond the scope of this short survey,[55] the following analysis will be highly selective inasmuch as it focuses on jurisprudential choices of Austrian

---

51 Öhlinger, op. cit. n. 30, at p. 90.

52 Öhlinger, op. cit. n. 44, at p. 193.

53 See *supra* 2.2.

54 In the given context, the term 'supreme court' is to be understood as referring to organisational courts of last instance only. This notion is thus different from the concept of functional courts of last instance which the ECJ favours in connection with the duty to refer pursuant to Article 234(3) of the EC Treaty. Cf. ECJ, Case C-99/00 *Lyckeskog* [2002] *ECR* I-4839, para. 15. With regard to the Austrian legal system, the Constitutional Court *(Verfassungsgerichsthof)*, the Administrative Court *(Verwaltungsgerichtshof)*, and the Supreme Court *(Oberster Gerichtshof)* form the *trias* of courts whose case law is at issue here.

55 For a meticulous study on the implementation of European Community law by Austrian courts which extends to the implementation of international agreements forming part of the Community legal order see B. Bapuly and G. Kohlegger, *Die Implementierung des EG-Rechts in Österreich – Die Gerichtsbarkeit* (Vienna, Manz 2003).

supreme courts which could put into doubt the Community law features of international agreements concluded either by the EC alone or in conjunction with EU Member States. Two areas of potential shortcomings in Austrian supreme courts' approaches to international agreements can broadly be distinguished. The first category relates to the actual taking into account by Austrian supreme courts of international agreements which are applicable *ratione temporis, ratione materiae* and *ratione loci*. Put bluntly, do Austrian supreme courts apply the doctrines of direct applicability and direct effect also to 'Europeanised' international agreements? We may term this category as procedural compliance/non-compliance. Conversely, the second category is concerned with the question of substantive non-compliance. In how far do Austrian supreme courts honour the contents of the rights and obligations derived from 'Europeanised' international agreements in their application?

3.3.1. Direct applicability and direct effect

From a conceptual point of view, there is not much of a difference between the potential legal effects of international agreements concluded by the EC and treaties concluded by Austria. In both instances direct application and direct effect may in principle attach to treaty provisions. Within the Austrian constitutional system, international agreements concluded by Austria will in general be directly applicable, as long as their provisions are self-executing in the sense of defining the addressee and the contents of a norm to such an extent that it may be applied by the competent national authorities without there being a need for further implementing measures.[56] In line with the already mentioned doctrine of 'transformation', however, only upon its (general) transformation or adoption in conformity with national constitutional law a provision of an international agreement may in principle be invoked before a national court. In essence, this requirement is not different from the monism underlying the effects of treaties concluded by the EC which form an integral part of the Community legal order right from the time when they enter into force.[57] Thus, from the point of view of Austrian constitutional law the application of 'Europeanised' international agreements is not an altogether novel problem. This is somewhat confirmed by the case law of Austrian courts: Numerous judgments rendered *inter alia* by the Administrative Court evidence that Austrian supreme courts are at ease with applying international agreements forming an integral part of the Community legal order as part of the law of the land. This finding is corroborated rather than weakened by the fact that the direct applicability of, for instance, the association agreement with Turkey is not expressly discussed but rather presumed. This holds equally true for legal acts derived from

[56] Ermacora and Hummer, loc. cit. n. 45, at p. 117; Zemanek, loc. cit. n. 34, at p. 61. As will be noted, these criteria come close to the notion of direct effect in the Community legal order. There, the test is whether, "regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure". See ECJ, Case 12/86 *Demirel* [1987] *ECR* 3719, para. 14.

[57] Öhlinger and Potacs, op. cit. n. 44, at p. 74; cf. also Lenaerts and van Nuffel, op. cit. n. 41, at p. 739 et seq.

'Europeanised' international agreements, such as decisions of an Association Council established pursuant to an association agreement.[58] As a consequence, Austrian supreme courts implicitly show no hesitation in acknowledging the direct effect of treaty provisions that grant rights to individuals in a sufficiently precise and unconditional manner.[59] On the other hand, there are occasional instances where courts omit to refer to applicable 'Europeanised' agreements, not necessarily to the applicant's detriment, however. Hence, in a case of wage discrimination of a Bulgarian chemist working in Austria due to the non-recognition of periods of service in Bulgaria, the Supreme Court failed to apply the Europe Agreement with Bulgaria. Instead of applying the pertinent prohibition of discrimination contained in Article 38 of the Europe Agreement, by way of analogy to the EC Treaty the Supreme Court relied on a general principle of equal treatment as an expression of material justice.[60] By way of conclusion, the case law of Austrian supreme courts is not free from mistakes, but equally shows no signs of a general lack of implementation of 'Europeanised' international agreements. Two problematic constellations remain, however. The first one concerns the obligation to apply international agreements *ex officio*. The other one relates to the potential retroactive effect of treaties to facts having materialized before Austria's accession to the European Union. Both of these issues will be examined in turn.

3.3.1.1. Ex officio application of international agreements

Are national courts under an obligation to apply international agreements *proprio motu*, if the relevant provisions have not been pleaded by the parties to proceedings? If one accepts that certain international agreements form an integral part of the Community legal order, the answer given must not be different than that with regard to other sources of Community law. The nuanced approach adopted by the ECJ in *Peterbroeck*[61] and *Van Schijndel*[62] is therefore of equal relevance when the implementation of international agreements is at stake. Thus, in principle there is no requirement for national courts to raise provisions of Community law of their own motion,[63] unless there is also a duty to raise points of *national* law *proprio motu*. The question becomes one of national procedural laws, albeit subject to the double proviso of equivalence and effectiveness.[64] Requiring from applicants as a rule the substantiation of legal grounds for challenging individual legal acts[65], Austrian law relies on the initiative of the

58 See for instance Administrative Court, judgment of 4 December 1996, 95/21/0897, and judgment of 23 July 1998, 95/18/0763.

59 See for instance Administrative Court, judgment of 4 December 1996, 95/21/0897, and judgment of 19 February 1997, 96/21/1118.

60 Supreme Court, judgment of 23 May 1996, 8 ObA 2105/96. For a more detailed discussion of this judgment see Bapuly and Kohlegger, op. cit. n. 55, at p. 568 et seq.

61 ECJ, Case C-312/93 *Peterbroeck* [1995] *ECR* I-4599.

62 ECJ, Joined Cases C-430 and C-431/93 *Van Schijndel* [1995] *ECR* I-4705.

63 *Ibid.*, at para. 15.

64 Cf. K. Lenaerts and D. Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell 1999), 3-014.

65 See for instance Article 28(1) 4 of the Law on the Administrative Court.

parties as to raising points of law (so-called *Dispositionsmaxime*). In *Van Schijndel*, the Court dealt with civil law proceedings, eventually holding as follows:

> 20 In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.
>
> 21 That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.

A fortiori, this reasoning must also hold for administrative law proceedings where usually party initiative is more limited and the judge takes a more pro-active role in raising points of law of his own motion. In the light of more limited party initiative in the case of the Administrative Court,[66] for instance, a dominant stream in Austrian literature assumes a duty of the Administrative Court to raise points of law of its own motion, within the framework of the dispute set by the parties' submissions.[67] At the same time, Austrian supreme courts do not always live up to this standard, at least not if applied strictly. Thus, the Administrative Court has been criticised for restricting its legal analysis to those provisions relating to rights of residence of Decision No. 1/80 adopted by the Association Council under the association agreement between the EEC and Turkey which had been invoked by the applicant (and as a consequence denying a right of residence), without examining more favourable provisions which could eventually have led to a finding to the contrary.[68]

3.3.1.2. Retroactivity?

Austrian supreme courts are at times quick in discarding the applicability of 'Europeanised' international agreements to sets of facts which occurred before Austria's accession in 1995. A case in point is a judgment of the Administrative Court with regard to the Cooperation Agreement between the EEC and Tunesia.[69] Here the exclusion from Austrian territory of a Tunesian national for a period of five years was in issue, which had been ordered in July 1994. The applicant challenging this decision was a student at an Austrian university and had been caught operating a taxi cab without previously having obtained the requisite permit. Upon his request to refer to the ECJ a preliminary question regarding his entitlement to work in Austria and related rights flowing from the cooperation agreement, the Administrative Court denied the necessity of a referral given the fact that the challenged decision dated from

66 Bapuly and Kohlegger, op. cit. n. 55, at p. 201.
67 *Ibid.*, at p. 201 with further references.
68 Administrative Court, judgment of 4 December 1996, 95/21/0897, and the criticism voiced by Bapuly and Kohlegger, op. cit. n. 55, at 201 et seq.
69 Administrative Court, judgment of 9 November 1995, 95/18/0102.

the time before Austria's accession. Appealing as this reasoning may appear at first sight, in particular from the point of view of legal certainty and legitimate expectations, it is highly doubtful whether it is in conformity with the pertinent case law of the ECJ.[70] In *Saldanha*[71] the Court held as follows:

> 14 In view of the fact that the Act of Accession contains no specific conditions whatsoever with regard to the application of Article 6 of the Treaty, the latter provision must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities. From the date of accession, therefore, nationals of another Member State can no longer be made subject to a procedural rule which discriminates on grounds of nationality, provided that such a rule comes within the scope ratione materiae of the EC Treaty.

Consequently, Community law may apply also to "future effects" of factual situations having arisen prior to accession. It is conspicuous that in *Saldanha* the ECJ explicitly dispelled the view that Community law would not apply if the challenged decision issued by an Austrian court predated Austria's accession.[72] Dealing with non-discrimination in the labour law context, in the more recent *Pokrzeptowicz-Meyer* case the ECJ applied an analogous reasoning, holding that the prohibition of discrimination as contained in the Europe Agreement with Poland applied from the entry into force of that agreement, *without any need to consider whether workers are employed under a contract of employment concluded before or after that entry into force*.[73] It would appear from these judgments that the "future effects"-doctrine as applied by the ECJ already comes into play when a final legal determination by a court of last instance is still pending, such as is the case when a supreme court has been called upon to adjudge in a particular case after the time of accession. The reasoning of Austrian supreme courts as to the non-applicability of Community law to facts predating accession is thus in need of refinement, whereas at the same time this problem is liable to gradually fade away as the date of accession becomes more and more remote in time.

3.3.2. Substantive Non-compliance

The implementation of 'Europeanised' international agreements by national courts requires interpretative choices which may eventually give rise to non-compliance with the substantive precepts of Community law. In this respect the implementation of international agreements is no different from applying other sources of Community law, such as regulations or directives, and indeed no differences in the compliance rate with international agreements on the one hand and other Community law acts on the other hand could be found. Whereas in general the compliance rate of Austrian supreme courts must be taken to be very high,[74] occasional

---

70 Bapuly and Kohlegger, op. cit. n. 55, at p. 349 et seq.
71 ECJ, Case C-122/96 *Saldanha* [1997] *ECR* 1997, I-5325.
72 *Ibid.*, at paras. 12-14.
73 ECJ, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] *ECR* I-1049, para. 56.
74 Cf. Bapuly and Kohlegger, op. cit. n. 55, at p. 25 et seq.

problems remain, in particular in connection with violations of the duty to refer pursuant to Article 234(3) of the EC Treaty.[75]

4. Community law in International Agreements with Third States

When parts of Community law are integrated into international agreements between the EC and third States, the question arises how these agreements are applied and interpreted by the contracting States.[76] The fact that such agreements embody tailor-made modes of cooperation remaining in general way below the threshold of full-fledged EU membership and often reflect the outcome of subtle political bargaining tends to add substance to the legal analysis and at the same time makes it imperative to separately analyze the legal situation for each State concerned. In the following we will examine two different cases: First, we shall deal with the legal effects of some of the bilateral agreements of the European Community (partly in conjunction with the EU Member States) with Switzerland (4.1.). Second, the legal effects of the EEA Agreement in Liechtenstein will briefly be dealt with (4.2.). This brevity is due to the fact that many questions of EEA law by now have received the attention of a host of contributions in legal writing. Moreover the EFTA Court already had the chance to clarify a great number of issues.[77] The differences between the legal situations in both countries warrant different approaches in evaluating legal phenomena in light of the sliding scale of 'Europeanisation'. So, in the case of Switzerland the study will focus on the varying degrees of Switzerland's *'rapprochement'* with the Community legal order and their impact on the Swiss legal order, whereas with regard to Liechtenstein, given the more standardised and familiar approach of EEA law, the emphasis of the discussion will be placed on the effects of EEA law in the Liechtenstein legal order.

4.1. Bilateral Agreements EU – Switzerland

Switzerland has concluded two 'packages' of bilateral and sectoral[78] agreements with the EC and the Member States respectively. The so-called 'bilateral I' agreements entered into force

---

75 See for instance Administrative Court, judgment of 29 November 2000, 99/09/0103. In this judgment the Supreme Administrative Court 'autonomously' determined the required duration of integration of a sponsor into the labour market in order for rights of residence of his family members to be derivable. In light of the uncertainties left by the relevant provision of Decision No. 1/80 of the Council of Association under the association agreement between the EEC and Turkey, a reference to the ECJ would have been required.

76 See *supra* 2.2.

77 Cf. to both aspects the contributions and tables in C. Baudenbacher/P. Tresselt/T. Orlygsson, eds., *The EFTA Court Ten Years On* (Oxford and Portland, Hart Publishing 2005).

78 The expression 'bilateral agreements' is apparently only used in Switzerland and contrasts with the multilateral approach of the EEA. From a legal point of view, the expression is imprecise, to say the least, because the agreements are partially multilateral (since the EU Member States are also involved). For this reason, the shorthand of 'sectoral agreements' is more adequate for its emphasis on the fact that these agreements only cover chosen policy areas. Nevertheless, we will use the terms 'bilateral I' agreements and 'bilateral II' agreements in the following, since they have become customary in Switzerland.

in 2002. They consist of seven treaties; among the most important figures the agreement on 'free movement of persons.'

The seven agreements form a 'package' insofar as they could only enter into force collectively and as the non-prolongation or cancellation of each single one would result in the concomitant cancellation of all the other agreements. Nevertheless, each subject-matter is part of a separate agreement, there being no framework or skeleton agreement whatsoever.

Contrary to the EEA Agreement, these treaties do not qualify as 'integration agreements' and therefore do not encompass a real involvement in the ongoing integration process of the EU Member States. In fact, as far as their form is concerned, they are 'classic' international law instruments. They are based on the principle of equivalence of legislation and standards, and provide for central bodies consisting of representatives of each party: joint committees deciding by unanimity. It is incumbent upon these committees, among other things, to ensure the correct application of the agreements, to settle interpretative differences between the parties and to modify certain parts of the treaties. No provisions of Community law are in principle taken over. Nevertheless – and this applies with particular strength to the agreement on free movement of persons[79] – the agreements are partially aiming at the participation in the relevant sections of the *acquis communautaire*.

Soon after concluding the 'bilateral I' agreements, the very same parties entered into negotiations for the 'bilateral II'[80] agreements. These eight treaties deal with the 'leftovers' of the 'bilateral I' agreements as well as with some new political concerns from both sides. In the present context the agreement on cooperation in the fields of justice, police, asylum and migration (Schengen/Dublin) is of major interest. It envisages the true integration of Switzerland into the corresponding parts of the *acquis communautaire*, including in principle the obligation to adopt its further developments.[81] The various 'bilateral II' agreements are not legally connected with each other, whereas they are (partially) linked from a political point of view.

In order to elicit the exact effect of the bilateral agreements, one has to distinguish between different categories of obligations contained therein. Depending on the manner and extent of the '*rapprochement*' to already existing provisions in the Community legal order, we distinguish as follows:

- An agreement can refer directly to Community law provisions, and Switzerland will then be obliged to ensure an according legal position. Referring to the at times fairly technical acts of secondary Community law, this technique is often used. Annexes I and

---

79 For details see A. Epiney, 'Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommens', *Zeitschrift des Bernischen Juristenvereins* (2005), p. 1; A. Epiney, 'Das Abkommen über die Personenfreizügigkeit – Überblick und ausgewählte Aspekte', in A. Achermann, et al., eds., Jahrbuch für Migrationsrecht/Annuaire du droit de la migration 2004/2005, (Bern, Stämpfli 2005) p. 45.

80 Text and 'Message' of the bilateral II Agreements in: BBl. 2004, 5965 ff.

81 To a great extent the agreement is analogous to the association agreements with Norway and Island. Cf. A. Epiney, 'Schengen, Dublin und die Schweiz', *Aktuelle Juristische Praxis* (2002), p. 300 at p. 304 et seq.

II of the agreement on 'free movement of persons', for instance, contain a list of legal acts that Switzerland has to apply ('equivalence of legislation'). Annex 1 of the agreement on overland transport equally lists up a number of technical provisions, whereas Switzerland has to apply provisions that are 'equivalent' to Community law provisions. Finally, the substantive law provisions in the Schengen/Dublin agreements basically refer to the *acquis communautaire*.

- Furthermore Switzerland's obligations can be mentioned in the agreement itself (or in the annexes respectively), whereas their content is largely or entirely based on the situation in EC law. Annex I of the 'agreement on free movement of persons', for instance, in part literally adopts Community law provisions or alludes to parallel obligations that can be found in Community law. Article 1(3) of the agreement on overland transport refers correspondingly to the principle of non-discrimination contained in Article 12 EC. A similar solution can be found in Article 6 of the agreement on certain aspects of government procurement which again contains the non-discrimination principle.
- Finally, the bilateral treaties can contain completely autonomous provisions that do not refer in any form to the *acquis communautaire*.

As far as the agreements – directly or indirectly – go back to the *acquis communautaire*, the complex question arises, whether and in how far those provisions are to be interpreted in parallel with the legal position in Community law. This question has to be answered – since they are treaties – based on international law principles of interpretation and separately for each agreement. In cases in which the aim of the agreement – to aspire to a parallel legal position – can clearly be detected, there is much to be said for a parallel interpretation, while the temporal frame of reference has to be specified.[82] The technique of implanting large and significant parts of the *acquis communautaire* entails complex problems of interpretation, since a parallel interpretation cannot be assumed for every aspect in advance. Consequently, the meaning of each provision has to be determined for each individual case, which brings about considerable legal uncertainty.

Legal protection in Switzerland – where agreements due to a monist understanding of international and domestic law are effective as such and certain rules are self-executing[83] – is disconnected from the Community judiciary as Swiss courts have no access to the ECJ within the preliminary rulings procedure. The ensuing danger of differential case law on the interpretation of the agreement by the ECJ on the one hand (which has to interpret the agreements as an integral part of the Community legal system) and Switzerland on the other hand rather aggravates than remedies legal uncertainty. If the ECJ rules differently on a certain issue than Swiss courts, the question arises whether the latter are under an obligation

---

82 For a detailed comment concerning the agreement on free movement on persons compare Epiney, op. cit. n. 79 ('Zur Bedeutung der Rechtsprechung …'), at 1 et seq.

83 Compare for example D. Wüger, *Anwenbarkeit und Jusitziablität völkerrechtlicher Normen im schweizerischen Recht* (Bern, Stämpfli 2005), passim.

to modify their case law. This problem is closely associated with the question of the pertinence of the ECJ's case law in instances in which the bilateral agreements refer to parts of the *acquis communautaire*. Some of these agreements contain (direct or indirect) obligations to take judgements into consideration that were rendered before the signing of the agreements. According to Article 16(2) of the agreement on free movement of persons or the Schengen association agreement, for instance, a qualified deviation from case law may lead to the cancellation of the agreements. In other treaties, however, there is no reference to the case law of the ECJ, even though they frequently employ Community law terms. In any case the relevance of the case law of the ECJ is largely undetermined and does not result clearly from the agreements. If mandatory recourse to the case law is provided for, it is doubtful which judgements are precisely relevant and how the 'old' case law is to be distinguished from the 'new' one (that is to say, the one after signing the treaties). Even if no recourse to the case law of the ECJ is provided for, a few arguments still speak in favour of such an option, since when referring to the *acquis communautaire* the agreements aim at constructing a parallel legal regime in relation to Switzerland. This reveals at the same time that it will often be unclear whether and how far the case law of the ECJ has to be taken into account in order to render a judgment in a particular case, which again detracts from legal certainty.

The approach of the bilateral agreements, which is inspired by 'classic' international law implies that – unlike the EEA Agreement – they contain in principle static obligations and that the joint committees play an important role in settling disputes and further developing the treaties. Concerning the adoption of the *acquis communautaire*, this approach implies that one has to refer to the actual state of Community law (and, as mentioned before, including the case law) at the time of signing the treaty. When modified, Community law is in other words not automatically incorporated on the basis of the bilateral agreements. Nevertheless, the agreements are to ensure a parallel legal position in Switzerland in relation to the EU, at least as far as they 'directly or indirectly' refer to the *acquis communautaire*. However, this aim could not be achieved, if the bilateral agreements could not be assimilated to further developments of Community law. Therefore, the agreements contain, as a rule, specific provisions for the adoption of new Community law. Referring to legislation, one can basically distinguish between two 'mechanisms of adoption'[84]:

- Either the joint committee is competent to modify provisions (of the annexes as a rule), which is provided for in several bilateral agreements;
- or the agreements establish the obligation in principle to adopt future developments of the relevant parts of the *acquis communautaire*. Whereas the adoption takes place in accordance with domestic law, the agreement will terminate automatically if new Community law remains unadopted, however. The Schengen and Dublin association takes up this model.

[84] Only mechanisms referred to in the agreements themselves are taken into account here. Apart from that, the agreements could of course be modified at any time which, however, implies going through the rather ponderous procedure of concluding a new treaty.

Analysing by way of conclusion the manner in which Switzerland is directly or indirectly bound by the *acquis communautaire*, one can conclude as follows:

- The legal effects of the provisions contained in the bilateral agreements that take over Community law are largely unclear, especially the degree of dependence on corresponding interpretations used in Community law as well as the relevance of the case law of the ECJ. These insecurities will be removed only on a limited scale by developing relevant general principles. In the end some legal uncertainty concerning the interpretation of various provisions will remain. In this respect it is telling that the Court for social insurance of the Canton of Zurich and the Federal Council (the Swiss Government) take opposite stances concerning the range of the freedom to provide services contained in the agreement on free movement of persons, for instance.[85] For the law abiding citizen this situation is awkward, as a large number of interpretation questions – which could easily be answered in Community law – have to be answered on a case-by-case basis.
- Concerning legislation, Switzerland has to adopt those parts of Community law, as referred to by certain agreements. In cases in which the take-over of further developments of Community law is provided for in an agreement, apart from the legal obligation there will be considerable political and economical pressure to adopt new laws, even though Switzerland has not taken part in the decision-making process on the European plane.[86]

4.2. Legal effects of the EEA Agreement in Liechtenstein

The legal effects of the EEA Agreement in Liechtenstein have to be seen against the background of the general relationship between national and international law in the legal system of Liechtenstein. Liechtenstein – as well as Switzerland – takes a monist approach to the relationship between international and national law. That is to say, courts and doctrine apply treaties automatically with their entry into force on the international level.[87] This principle is of a constitutional nature even if it is not expressly laid down in the Constitution but rather presupposed by several of its provisions. As far as the relationship between treaties and national law is concerned, treaties (at least those consented upon by the Parliament) are in any case hierarchically situated above national legal acts.[88] Furthermore, some international

---

85 See Sozialversicherungsgericht des Kantons Zürich, judgment of 19 February 2004, IV.2003.00221, E.6. Epiney, loc. cit. n. 79 ('Das Abkommen…') at pp. 59 et seq.

86 In the context of the Association of Schengen, Swiss representatives will be consulted when a corresponding project is elaborated. In a political perspective this involvement should not be underestimated.

87 Cf. with further references Stefan Becker, *Das Verhältnis zwischen Völkerrecht und Landesrecht nach Massgabe der Praxis des Staatsgerichtshofes des Fürstentums Liechtenstein* (Schann, GMG 2003) p. 107 et seq.

88 Cf. with further references on this point Becker, op. cit. n. 87, p. 295 et seq.

agreements may have a constitutional character, such as the European Convention on Human Rights.

As far as the EEA Agreement is concerned, it has been concluded by reference to the 'ordinary' procedure.[89] The difference from other treaties lies in the legal effects of the EEA Agreement and 'secondary EEA law', which is of particular interest in this context. The Liechtenstein Constitutional Court ruled that the EEA Agreement has a constitutional character insofar as it modifies parts of the Constitution. Thus, the Agreement itself takes precedence over the Constitution. Although it is not clear if secondary law based on the EEA Agreement also has precedence over the Constitution, the Constitutional Court pleads in favour of such a position. At the bottom of this proposition certainly lies the special character of the EEA Agreement which demands at least an 'in fact superiority' of EEA law in relation to national law.[90] Consequently, EEA law is in general considered as a sort of 'quasi-supranational law', so that in fact its characteristics are similar to those of European Community law.[91] This approach has in principle been confirmed by the EFTA Court. The president of this Court has summarised the position on key questions of the effects of EEA law as 'quasi-direct effect, quasi primacy and full State liability.'[92] So, according to practice and doctrine EEA (primary and secondary) law can have direct effect. The question, whether a particular provision is capable of having direct effect has to be answered by applying the same principles as those in European Community law.[93] As far as other questions of interpretation of EEA law are concerned, practice in Liechtenstein – based on the rulings of the EFTA Court[94] – generally interprets EEA law in parallel with European Community law.[95]

5. Conclusion

As has been seen, Austria's accession to the European Union in 1995 has brought about a moderate 'Europeanisation' of rules of national constitutional law with regard to the conclusion, ratification and implementation of international agreements concluded by the EC alone or in conjunction with EU Member States. In general, Austrian supreme courts have

89 Cf. Becker, op. cit. n. 87, 133 et seq.

90 Cf. art. 97 et seq. EEA, cf. also art. 7 EEA which rules that the system of secondary law has in fact to be applied also by EEA States. Cf. on this issue A. Epiney, *Der Stellenwert des europäischen Gemeinschaftsrechts in Integrationsverträgen* (Bern, Stämpfli Verlag 1992) pp. 90 et seq.

91 Cf. on this issue with further references Becker, op. cit. n. 87, pp. 201 et seq.

92 Carl Baudenbacher, 'The EFTA Court Ten Years On', in : C. Baudenbacher/P. Tresselt/T. Orlygsson, eds., loc. cit. n. 77, p. 13 (26).

93 Provisions of treaties concluded by Liechtenstein outside the EEA context may have direct effect, provided they are sufficiently precise and concrete, and thus self-executing. On this cf., for instance, the first additional country report of the Principality of Liechtenstein of 3 June 1998 pursuant to Article 19 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 48, available online at: http://www.liechtenstein.li/pdf-fl-staat-aussenpolitik-cat2.pdf#search=%22Liechtenstein%20%22self-executing%22%22 (5 October 2006).

94 Cf. on this issue the contributions in C. Baudenbacher/P. Tresselt/T. Orlygsson (ed.), loc. cit. n. 77.

95 Cf. with further references on this point Becker, op. cit. n. 87, p. 373 et seq.

lived up to the challenges posed by the implementation of 'Europeanised' international agreements by giving effect to their provisions in disputes before them. The bilateral agreements between Switzerland and the EC (and the EU Member States respectively) aim, *inter alia*, at the participation of Switzerland in particular parts of the *acquis communautaire*, by resorting to instruments of international law. The bilateral treaties are, from a formal point of view, pure international law instruments and have no integrationist character, in contrast to the EEA. Ultimately, however, large parts of the bilateral agreements entail a sort of 'partial integration' into the legal system of the Union. The further the material area of application of such partial integration without Member State status reaches, the more it meets the legal and political confines discussed. Therefore a continuation of the 'bilateral path' leads inevitably to the consideration of the advantages and disadvantages of EU membership. In Liechtenstein EEA law is capable of having direct effect. In order to detect whether a provision has this capability Community law principles are applied. As far as other interpretative questions of EEA law are concerned practice tends to proceed in parallel with European Community law.

To sum up, we can pinpoint that the 'Europeanisation of international law' has reached different degrees in the three countries in question. This is of course partly due to the different levels of integration into the Community legal order. Nevertheless, it is a fact that the influence of Community law on international agreements is tangible in all these States. Not only the 'pressure' of the common market but also the far-reaching development of Community law make it impossible for non-EU Member States to conclude treaties disregarding the legal dynamism of the Community legal order.